

19 July 1974

STATINTL

MEMORANDUM FOR: Assistant Legislative Counsel

SUBJECT : Comments on OMB Revised Alternate Draft to H.R.
12206, A Bill to Amend Title 5, U.S. Code

1. You have requested comments from this Office on the revised alternate draft to H.R. 12206 prepared by OMB and the staff of the House Subcommittee on Foreign Operations and Government Information. Specifically, you requested that we review the section dealing with judicial review of Agency actions and decisions within the provisions of the draft.

2. Subsection 2(j)(1) provides that U.S. District Courts shall have jurisdiction of civil actions in the following situations:

- a. whenever an agency refuses to comply with a request for access by an individual to records pertaining to that individual, including copying;
- b. whenever an agency fails to maintain records in an accurate, timely, relevant, and complete manner necessary to assure fair determination relating to an individual's 'qualifications, character, rights, opportunities, or benefits that may be made on the basis of such records and consequently make (sic) such a determination which is adverse to the individual; ' and,
- c. whenever the agency fails to comply with any other provision of section 2 in such a way as to adversely affect an individual.

3. Subsection 2(j)(2)(A) further provides that in any suit brought under section 2(j)(1)(A) for access to and copying of individual records the court may issue injunctions and order production of individual records, and, may examine Agency records in camera to determine if such records are properly withheld under the exemptions of subsections 2(f) or (g).

4. To start in reverse order, it seems clear that the judicial review provision of subsection (j)(2)(A) discussed in the preceding paragraph does not apply to CIA. This is so because it pertains only to suits brought under (j)(1)(A) and CIA is not subject to those suits. Subsection (j)(1)(A) allows suit upon agency refusal of an individual request under (e)(1) for access and copying of records, but subsection (f)(2) provides that all other subsections except those it lists shall not apply "to any system of records maintained by the Central Intelligence Agency." Subsection (e) is not listed in subsection (f). Thus, the judicial review provisions of (j)(2)(A) do not apply to CIA because they pertain to suits concerning provisions of the bill not applicable to CIA.

5. In examining the two remaining judicial review provisions of (j)(1) to determine if they apply to CIA, it is again necessary to refer to the language of subsection (f) which contains the Agency's exemption. The language of subsection (f) provides that "except as provided in subsections (b)(1)(A) through (E), (d)(4), and (d)(5) the provisions of this section shall not apply to any system of records... maintained by the Central Intelligence Agency." Subsections (b)(1)(A) through (E) require publication in the Federal Register of certain information on systems or records maintained by an agency. Subsection (d)(4) commands that agencies not disclose records to officers and employees within the agency except when there is a need for such record in the performance of the officer or employee's duties. Subsection (d)(5) commands that agencies not maintain any records concerning political or religious belief, affiliation or activity unless authorized by statute or the individual concerned.

6. The judicial review provision of (j)(1)(B) deals, as did (j)(1)(A), with specific individual records. Subsection (j)(1)(B) allows suit when an agency has failed to maintain "accurate, relevant, timely, or complete" records. It apparently constitutes the remedy available to an individual when an agency refuses to correct an erroneous record as provided for in subsection (e)(2). Since the Agency is exempt from subsection (e) and individuals cannot gain access to CIA records to determine if they are inaccurate, irrelevant, untimely, or incomplete, subsection (j)(1)(B) does not confer jurisdiction on the district courts to review any agency actions.

7. Subsection (j)(1)(C), however, does seem to confer jurisdiction on the district courts to review compliance with those provisions of the bill listed in subsection (f) which apply to the Agency. This is so because subsection (f)

does not exempt the CIA from all provisions of the bill. Instead, the exemption provides only that "the provisions of this section shall not apply to any system of records maintained by the Central Intelligence Agency." The judicial review provision in subsection (j)(1)(C), though not specifically listed in subsection (f) as applicable to CIA, would seem to be so applicable because it provides for review of provisions of the bill with which the Agency must comply. Thus, it would appear that if an individual could show that he was adversely affected, suit would be permitted to question CIA compliance with the requirement for publication of the information in subsection (b)(1)(A) through (E). Suits alleging non-compliance with subsections (d)(4) and (d)(5) would be even more difficult since individuals will not be able to obtain the records which would provide the basis for such actions.

8. Based upon the considerations above, it is not anticipated that the judicial review provision of the subject alternate draft to H.R. 12206 will be a problem for the Agency.



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Office of General Counsel